

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION**

In re:

DAVID F. PETRANO,
MARY KATHERINE DAY-PETRANO

CASE NO.: 13-10052-KKS
CHAPTER: 12

Debtors.

ORDER ON ORDER TO SHOW CAUSE (DOC. 29)
AS TO APPOINTMENT OF GUARDIAN AD LITEM

This case came before the Court on the Order to Show Cause entered on March 20, 2013 (“OTSC,” Doc. 29) directing the Debtors to appear and show cause why a guardian ad litem should not be appointed for co-Debtor, Mary Katherine Day-Petrano (“Day-Petrano”). The Court held a preliminary hearing on the OTSC on April 4, 2013, at which the co-Debtor, David Petrano (“Mr. Petrano”) appeared in person and Day-Petrano appeared telephonically. Pleadings filed by the Debtors had triggered the issuance of the OTSC because those pleadings contained allegations that Day-Petrano has “severe Autism” and is a “severely disabled person requiring a Guardian Ad Litem.” (Doc. 20 at 2-3). The hearing on April 4 was, in many respects, tumultuous. At various times during the hearing, Day-Petrano sounded lucid; at other times during the hearing Day-Petrano sounded extremely agitated and was difficult to control. Day-Petrano’s demeanor during the hearing, together with strenuous urging of both Mr. Petrano and Day-Petrano, led the Court to announce an intention to appoint a guardian ad litem for Day-Petrano.

Since the hearing the Court has more thoroughly reviewed the few reported bankruptcy cases on this issue, the Bankruptcy Rules and the scant legislative history pertaining to the appointment of a guardian ad litem in bankruptcy, in particular in Chapter 12 and 13 cases. As a result of this more in-depth review of Bankruptcy Rules 1004.1 and 1016 and applicable case law, this Court has determined that its announced intention, in the heat of the moment, to appoint a guardian ad litem for Day-Petrano appears not to be adequately supported by applicable bankruptcy law, the Rules of Bankruptcy Procedure or the Florida Statutes. This Court hereby recedes from its announcement at the April 4

hearing of its intention to appoint a guardian ad litem to represent the interests of Day-Petrano in this Chapter 12 case. Instead, the Court shall stay this case to give the Debtors an opportunity to seek and obtain a guardian ad litem for Day-Petrano in the proper forum.

This is an issue of first impression for this Court. Only two of the Federal Rules of Bankruptcy Procedure mention incompetency. Federal Rule of Bankruptcy Procedure 1004.1 provides, in relevant part, that a court “shall appoint a guardian ad litem for an infant or *incompetent person* who is a debtor and *is not otherwise represented*.” Fed. R. Bankr. P. 1004.1 (emphasis added). This Rule applies in bankruptcy cases involving a person who is incompetent when the petition is filed. *In re Whitehead*, No. 05-50136, 2005 WL 1819399, at *2 (Bankr. M.D.N.C. July 22, 2005). In the event of a debtor’s death or incompetency during a reorganization case pending under Chapter 11, 12, or 13, Rule 1016 allows a court to either dismiss the case; or “if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, *as though the death or incompetency had not occurred*.” Fed. R. Bankr. P. 1016 (emphasis added). The difference in the two rules is that Rule 1004.1 allows a bankruptcy court to appoint a guardian ad litem when an incompetent person files a petition and is not “otherwise represented,” whereas Rule 1016 applies to a post-petition death or incompetency and allows a bankruptcy court to either dismiss a reorganization case or proceed as though the incompetency had never occurred. Both rules are triggered only if a person is “incompetent,” both make appointment of a guardian ad litem optional, and Rule 1016 gives an alternative remedy of dismissal of a reorganization case.

This Court has found no statutory authority for making an initial finding or determination of whether or not a debtor may be “incompetent.” Bankruptcy courts are not designed or equipped to make such determinations. Nothing in the Bankruptcy Rules or reported cases suggests that bankruptcy courts should be making such adjudications. Here, the Debtors do not allege that Day-Petrano is “incompetent,” but rather allege that she has “severe Autism” and is a “severely disabled person requiring a Guardian Ad Litem.” None of the Code provisions or Bankruptcy Rules address

debtors with alleged disabilities; rather, the two Rules address specifically “incompetent persons.” Nothing short of a finding of “incompetency” appears to support a bankruptcy court’s appointment of a guardian ad litem.

The Bankruptcy Code does not define “incompetent person,” so bankruptcy courts must look to state law. *In re Moss*, 239 B.R. 537, 539 (Bankr. W.D. Mo. 1999). In Florida, circuit courts have exclusive original jurisdiction of proceedings related to guardianship and the determination of incompetency. § 26.012(2)(b), Fla. Stat. (2012).¹ Article V, section 20, of the Florida Constitution, titled "Schedule to Article V," provides that: “Circuit courts shall have . . . exclusive original jurisdiction . . . of proceedings relating to the settlement of the estate of decedents and minors, the granting of letters testamentary, **guardianship**, involuntary hospitalization, **the determination of incompetency** Art. V, § 20, Fla. Const. (emphasis added.) Chapter 744 of the Florida Statutes centers on the appointment of guardians. Under Florida Statute 744.331, when determining whether a person is incapacitated so as to require a guardian ad litem, the court:

[S]hall appoint an examining committee consisting of three members. One member must be a psychiatrist or other physician. The remaining members must be either a psychologist, gerontologist, another psychiatrist, or other physician, a registered nurse, nurse practitioner, licensed social worker, a person with an advanced degree in gerontology from an accredited institution of higher education, or other person who by knowledge, skill, experience, training, or education may, in the court’s discretion, advise the court in the form of an expert opinion.

§ 744.331, Fla. Stat. (2012). Because there has not been a prior determination as to competency (or incapacity) as to Day-Petrano, this Court cannot find that Day-Petrano is “incompetent,” which is a prerequisite for Bankruptcy Rule 1004.1 or 1016 to apply. A state court with experience and expertise in this area should make that determination. The state court also can make the appropriate determination regarding the extent to which Day-Petrano may need a guardian ad litem.

¹ The Florida Statutes do not contain a definition of “incompetency.” At one point the statutes provided a definition of an “incompetent” person; however, after 1989, the statute was amended and “incompetent” was changed to “incapacitated.” *McJunkin v. McJunkin*, 896 So.2d 962, 963 (Fla. 2d DCA 2005). Currently, the Florida Statutes define an “incapacitated person” as a “person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person.” § 744.102(12), Fla. Stat. (2012).

The Court is aware of only four reported opinions in which bankruptcy courts have appointed, or even considered appointment of, a guardian ad litem for a debtor. *In re Myers*, 350 B.R. 760 (Bankr. N.D. Ohio 2006); *In re Moss*, 239 B.R. 537 (Bankr. W.D. Mo. 1999); *In re Benson*, No. 10-64761-PWB, 2010 WL 2016891 (Bankr. N.D. Ga. Apr. 30, 2010); *In re Whitehead*, No. 05-50136, 2005 WL 1819399 (Bankr. M.D.N.C. July 22, 2005). In two of those cases the courts had before them rulings by a state or federal court that the debtor was, in fact, incompetent. See *In re Moss*, 239 B.R. at 540 (noting that the debtor was declared incompetent by a district court in a criminal proceeding); *In re Whitehead*, 2005 WL 1819399 at *2 (adopting the state court's finding that there was "clear, cogent, and convincing evidence" that the debtor was incompetent based on "[a]n 'Order on Petition for Adjudication of Incompetence' . . . entered by the Superior Court of Forsyth County, North Carolina . . ."). In the other two cases the facts were extreme: in *Benson*, the bankruptcy court found that the debtor did not even understand that she was a debtor in a bankruptcy case. *In re Benson*, 2010 WL 2016891 at *1. In *Myers*, the debtor (for whom the court appointed a "next friend"), suffered from dementia, could not communicate, was confined to a nursing home, and had sought excusal from attending the pre-petition credit counseling under 11 U.S.C. § 109(h)(4) due to his incapacity. *In re Myers*, 350 B.R. at 761.

In *Moss* and *Whitehead*, both Chapter 7 cases, the bankruptcy trustee filed the motion to appoint a guardian ad litem for the debtor; here, the Chapter 12 Trustee has not filed such a motion. *In re Moss*, 239 B.R. at 538; *In re Whitehead*, 2005 WL 1819399 at *1. The Chapter 12 Trustee has done nothing out of the ordinary in this case: he has concluded the § 341 meeting (Doc. 30) at which he questioned the Debtors, including Day-Petrano, under oath, assisted the Debtors with filing certain DIP Reports (Docs. 39-41) and elected not to participate in the hearing on the OTSC (Doc. 66).

In spite of some of Day-Petrano's behavior at the April 4 hearing, the pleadings that the Debtors have filed in this Court as well as in a pending District Court action indicate that Day-Petrano understands litigation and clearly understands that she is a debtor in this Chapter 12 bankruptcy case.

Unlike the debtor in *Myers*, Day-Petrano has received the required pre-petition credit counseling (Doc. 4), attended the § 341 meeting, and did not seek an excusal under 11 U.S.C. § 109(h)(4). At the April 4 hearing, Day-Petrano asked this Court specifically if the order on the Debtors' Emergency Motion² would include a paragraph that the automatic stay would prevent anyone from attempting to collect sanctions being imposed by the District Court. At the same hearing, when this Court raised the issue of whether the Debtors are eligible for Chapter 12 relief, Day-Petrano emphatically pointed out that they do, indeed, operate a farm and that their income is from a farming operation, which is one of the prerequisites for eligibility for Chapter 12 relief. Both Debtors signed the Schedules and Statement of Financial Affairs filed with this Court, have filed several monthly reports, and have filed a separate adversary proceeding. In the District Court case, the Debtors filed a Complaint and an Amended Complaint, as well as various other pleadings. It appears that Day-Petrano may also have filed other matters in other forums.

The Debtors allege the existence of "Active Federal Court Guardian Ad Litem Orders" (Doc. 20 at 2) but they have yet to provide this Court with copies of any such orders. When this Court inquired about the existence of such orders at the April 4 hearing, Day-Petrano said that the Debtors do not have copies due to smoke damage done at Debtors' home pre-petition.³

At one point during the April 4 hearing this Court indicated that if it were to appoint a guardian ad litem for Day-Petrano it felt Mr. Petrano would be the best candidate, since he is with Day-Petrano all the time, is intimately familiar with her condition(s) and was the only one at the hearing able to calm Day-Petrano when she became agitated. Both Mr. Petrano and Day-Petrano stated that Mr. Petrano "could not" and "would not" serve as guardian ad litem for Day-Petrano. Pursuant to Bankruptcy Rule 1004.1, applicable in this case because of the Debtors' assertions that Day-Petrano's

² *Emergency Ex Parte Motion to Enjoin Creditors Trevor Rhodes, Gina Smith, Nationwide Mutual Fire Insurance Company, Carl Schwait, and Magistrate Judge Gary R. Jones from Intentionally, Knowingly, and Willfully Violating the Automatic Stay and to Immediately Impose 11 U.S.C. § 105 Stay* (Doc. 20).

³ Attached to one of the pleadings is a copy of a 1997 order of the Bankruptcy Court Northern District of California prohibiting Day-Petrano from filing any further papers in that court other than through a guardian ad litem. Nothing in that Order amounts to an "Active Federal Court Guardian Ad Litem Order."

medical and other conditions existed pre-petition, the court is to appoint a guardian ad litem only for “an incompetent person” who is “not otherwise represented,” or enter such other order to protect the debtor. Here, even if Day-Petrano is incompetent it appears that she may be adequately “otherwise represented” by Mr. Petrano in this case, since he is familiar with the Debtors’ finances and Day-Petrano’s medical conditions and mental state.⁴

A finding of incompetency is not to be undertaken lightly. If this Court were to appoint a guardian ad litem for Day-Petrano under Bankruptcy Rule 1004.1, thereby automatically labeling her as an “incompetent person,” it could have significant consequences in other aspects of the Debtors’ lives. No doubt this is why the applicable Florida statutes require that a determination as to whether a person should have a guardian ad litem must be made by a panel of three experts trained in psychiatry or other medicine, social work and/or gerontology. Without an order of a court of competent jurisdiction ruling Day-Petrano as “incompetent” and/or appointing a guardian or guardian ad litem for Day-Petrano, it is the determination of this Court that it should go no further on this issue. It is the further determination of this Court that this Chapter 12 case, including all deadlines provided for in the Bankruptcy Code and Rules, should be stayed for a reasonable time to give the Debtors an opportunity to seek an adjudication of Day-Petrano’s competence from a court with jurisdiction over incompetency and guardianship. For the reasons stated, it is:

ORDERED:

1. The oral announcement by this Court on April 4, 2013, that this Court intended to appoint a guardian ad litem for Day-Petrano, is VACATED.
2. This Chapter 12 case, and all applicable deadlines shall be stayed until further order of the Court to permit the Debtors time to seek a determination in state court as to whether Day-Petrano is incompetent and as to whether, and to what extent, a guardian ad litem should be appointed for Day-Petrano.

⁴ Although Mr. Petrano is admitted to practice law in Florida, he is appearing in this case *pro se* and has made no appearance as counsel for either Debtor.

3. The Debtors may at any time submit to this Court certified copies of any "Active Federal Court Guardian Ad Litem Orders" or a viable order of a court of competent jurisdiction finding Day-Petrano incompetent or appointing a guardian ad litem for Day-Petrano.

4. The stay of this Chapter 12 case shall not apply to the adversary proceeding filed by the Debtors (AP 13-01003-KKS).

5. The Court shall conduct a status hearing in approximately ninety (90) days so that Mr. Petrano can report to the Court the status of any competency or guardianship proceeding for Day-Petrano, and for consideration as to whether this case should be dismissed as to Day-Petrano.

6. This Order is without prejudice to the Debtors' rights to proceed in this case without a guardian ad litem for Day-Petrano, and does not constitute a ruling on whether the Debtors qualify for relief under Chapter 12.

7. The automatic stay pursuant to 11 U.S.C. § 362 shall remain in full force and effect until further order of this Court.

DONE and ORDERED at Tallahassee, Florida on this 16th day of April, 2013. .



KAREN K. SPECIE
United States Bankruptcy Judge

Cc:
Mary Katherine Day-Petrano & David F. Petrano
11502 S.E. US Hwy 301
Hawthorne, FL 32640

All interested parties